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6 **UNITED STATES DISTRICT COURT**
7 **NORTHERN DISTRICT OF CALIFORNIA**
8 **SAN FRANCISCO DIVISION**

9
10 PUBLIC JUSTICE FOUNDATION;
ANIMAL LEGAL DEFENSE FUND;
11 CENTER FOR BIOLOGICAL DIVERSITY;
CENTER FOR FOOD SAFETY;
12 FOOD & WATER WATCH,

13 *Plaintiffs,*

14 *vs.*

15 FARM SERVICE AGENCY,

16 *Defendant.*

Case No. 3:20-cv-1103-WHA

**PLAINTIFFS' NOTICE OF MOTION
AND MOTION CHALLENGING
DEFICIENCIES IN FSA'S REVISED
SEARCH AND PRODUCTION;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT**

Judge: Honorable William Alsup
Date: September 17, 2020
Time: 8:00am
Location: 450 Golden Gate Ave.
San Francisco, CA, Crt. Rm. 12

1 **NOTICE OF MOTION AND MOTION CHALLENGING DEFICIENCIES IN FSA'S**
2 **REVISED SEARCH AND PRODUCTION**

3 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

4 PLEASE TAKE NOTICE that on the 17th day of September, 2020 at 8:00am or as soon
5 thereafter as this motion may be heard by the Honorable William Alsup in Courtroom 12, 450
6 Golden Gate Avenue, San Francisco, CA 94102, Plaintiffs Public Justice Foundation, Animal
7 Legal Defense Fund, Center for Biological Diversity, Center for Food Safety, and Food & Water
8 Watch, will, and hereby do, move the Court for an order finding Defendant Farm Service
9 Agency's revised search and production for documents responsive to Plaintiffs' April 17, 2019
10 FOIA request deficient and requiring Defendant Farm Service Agency to perform a new search
11 and production correcting the deficiencies as outlined in the foregoing memorandum of points
12 and authorities, and file and serve its new production and response, alongside a declaration and
13 *Vaughn* Index demonstrating the adequacy of the search and justifying any withholdings, within
14 fourteen days of this motion being heard. This Motion is based on this Notice of Motion and
15 Motion, the accompanying Memorandum of Points and Authorities (including the declaration
16 and exhibit attached thereto), the entire file in this matter, and the arguments of counsel.

17
18 Date: August 10, 2020

Respectfully submitted,

19 

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INTRODUCTION

1
2 Defendant Farm Service Agency (“FSA”)’s revised search and production in response to
3 Plaintiffs’ April 17, 2019 Freedom of Information Act (“FOIA”) request is deficient. FSA has
4 not met its burden to demonstrate that the search terms used and places searched were likely to
5 uncover any, let alone all, responsive information. Indeed, the productions FSA has made as a
6 result of its revised search nearly exclusively contain already publicly available information,
7 draft versions of already publicly available information, and emails between FSA staff attaching
8 said publicly available information. The search also failed to uncover documents that Plaintiffs
9 have confirmed exist and explained to FSA are highly responsive material. The result is a
10 document dump of nearly identical unresponsive documents produced over and over again.

11 To the extent FSA seeks to justify its search, according to its own declaration the search
12 performed contains no terms pertaining to FSA’s farm loan programs and resulting
13 environmental review or groups such as Plaintiffs, despite the fact that FSA’s practices in
14 responding to FOIA requests about said programs and from said groups are the central issue in
15 this dispute. Likewise, it appears FSA’s revised search did not even capture the responsive
16 material identified and produced in its original search. Thus, FSA’s declaration provides no
17 assurance that its search was capable, much less likely, to uncover relevant and responsive
18 information, as required by FOIA.

19 Therefore, Plaintiffs respectfully requests that the Court find Defendant FSA’s revised
20 search and production for documents responsive to Plaintiffs’ April 17, 2019 FOIA request
21 deficient and order Defendant FSA to perform a new search and production correcting the
22 deficiencies outlined below and file and serve its new production and response, alongside a
23 declaration and *Vaughn* Index demonstrating the adequacy of the search and justifying any
24 withholdings, within fourteen days of this motion being heard. In accordance with this Court’s
25 Case Management Scheduling Order, Dkt. No. 23, Plaintiffs’ present motion addresses “only
26 plaintiffs’ April 17, 2019, FOIA request and the government’s response thereto, *not* any prior
27 FOIA requests referenced in the complaint,” and Plaintiffs note only that the purpose of
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1 Plaintiffs’ April 17 request is to “establish the existence of an unlawful FOIA policy or practice,”
 2 which is highly relevant to Plaintiffs’ claims regarding FSA’s pattern and practice of unlawfully
 3 withholding nonexempt information under FOIA Exemptions 3 and 6.

4 **STATEMENT OF THE ISSUE**

5 Whether FSA’s revised search and production in response to Plaintiffs’ April 17, 2019
 6 FOIA request was deficient.¹

7 **FACTUAL AND PROCEDURAL BACKGROUND**

8 On February 12, 2020, Plaintiffs brought this action challenging FSA’s longstanding
 9 pattern and practice of improperly withholding records responsive to FOIA requests concerning
 10 FSA’s administration of farm loan programs. Dkt. No. 1, Plaintiffs’ Complaint, ¶ 4. Plaintiffs’
 11 primary concerns regard FSA’s pattern and practice of improperly withholding responsive
 12 records under FOIA Exemptions 3 and 6. *See id.* at ¶¶ 151-185 (detailing examples of FSA’s
 13 improper withholdings under these FOIA Exemptions in response to FOIA requests Plaintiffs
 14 individually submitted to FSA between March 2016 and September 2018 concerning FSA’s farm
 15 loan programs). These unlawful patterns of improperly withholding documents have prevented
 16 Plaintiffs from discovering critical information concerning FSA’s administration of farm loan
 17 programs and educating the public about FSA’s activities and use of taxpayer funds, thereby
 18 obfuscating FSA’s acquiescence to industrial polluters at the expense of independent farmers,
 19 public health, and the environment. *Id.* at ¶ 4.

20 In addition to the pattern and practice detailed in the complaint, Plaintiffs also brought
 21 claims regarding a FOIA request Plaintiffs collectively submitted to FSA on April 17, 2019 for
 22 “all records mentioning or containing FSA’s directives and/or policies for responding to and/or
 23 processing FOIA requests and appeals.” *Id.* at ¶ 106. The purpose of Plaintiffs’ request was, in

24
 25 ¹ So as to prevent delay on issues not central to the case (i.e. Plaintiffs’ primary claims regarding
 26 FSA’s pattern and practice of unlawful withholdings), Plaintiffs do not challenge the adequacy of
 27 FSA’s *Vaughn* Index. Nor do Plaintiffs challenge the FOIA Exemption 6 redactions that remain
 28 in FSA’s June 25, 2020 production as they relate to these specific documents. Plaintiffs reserve
 the right, however, to show there is an unlawful pattern and practice of withholding information
 under FOIA Exemption 6 through other evidence.

1 part, to “establish the existence of an unlawful FOIA policy or practice.” *Id.* Plaintiffs alleged the
2 search and production in response to the April 17 request were inadequate because, “[a]ccording
3 to FSA, there were only two responsive records: two emails explaining when FSA can release
4 corn producers’ data to a designated third party.” *Id.* at ¶ 109. Yet, FSA previously had released
5 partial records to Plaintiff Food and Water Watch that are relevant and responsive to the April 17
6 request that were not located or produced in response to the April 17 request. *Id.* at ¶¶ 93-105.
7 Because, at minimum, the discussions in these records should have been located as a result of a
8 reasonably calculated search, Plaintiffs knew FSA’s original search and production in response
9 to the April 17 request was inadequate. *Id.* ¶ 127.

10 In the meet and confer process leading up to the initial case management conference, the
11 parties were unable to come to a joint agreement on how to proceed. Dkt. No. 21, Joint Initial
12 CMC & Rule 26(f) Report, at 5-9. FSA conceded its search and production in response to the
13 April 17, 2020 request was deficient; therefore, Plaintiffs agreed that the best course of action
14 would be for the agency to re-perform its search and produce additional documents responsive to
15 that request, as this additional information could be relevant to establish the existence of an
16 unlawful FOIA policy (information which would be highly relevant to Plaintiffs’ pattern and
17 practice claims). *Id.* at 7. However, Plaintiffs did not agree with FSA’s proposal to re-perform its
18 searches and productions for all FOIA requests referenced in Plaintiffs’ complaint establishing
19 their pattern and practice claims. *Id.* Plaintiffs contend that, rather than perform such an onerous
20 task that will likely delay the litigation by months or years, FSA can simply “identify all
21 categories of information or types of records that Defendant has withheld under FOIA
22 Exemptions 3 and 6 in response to Plaintiffs’ FOIA requests at issue. The result being a clean
23 record of the full scope of the information at issue leaving only the legality of Defendant’s
24 withholdings to be determined.” *Id.* at 8. This would be sufficient to resolve Plaintiffs’ pattern
25 and practice claims which seek this Court to enjoin FSA from continuing to engage in its pattern
26 and practice of violating FOIA, Dkt. No. 1, ¶ 5, and which do not seek any further searches and
27 productions on any referenced FOIA requests beyond Plaintiffs’ April 17, 2019 request.

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1 After the initial case management conference, the Court ordered the action to proceed as
2 follows: “1. By June 25, 2020, the government shall file and serve its revised production in
3 response to plaintiffs’ April 17, 2019, FOIA request, alongside a declaration and *Vaughn* index
4 demonstrating the adequacy of the search and justifying any withholdings;” and “2. Plaintiffs
5 shall have until July 9 to file a motion challenging any deficiencies in the government’s
6 response. . . . The briefing should address only plaintiffs’ April 17, 2019, FOIA request and the
7 government’s response thereto, *not* any prior FOIA requests referenced in the complaint.” Dkt.
8 No. 23, Case Management Scheduling Order, at 1 (emphasis in original).²

9 On June 25, 2020, FSA filed the declaration of Philip Buchan, which provided
10 information concerning the steps FSA took to respond to Plaintiffs’ April 17, 2019 FOIA request
11 both before and after the initiation of this lawsuit. Dkt. No. 26-1, Declaration of Philip Buchan
12 (“Buchan Declaration”). The Buchan Declaration explains that in conversation with Public
13 Justice Foundation staff, FSA interpreted—**correctly**—that Plaintiffs’ request was not seeking
14 already publicly available documents such as the FSA handbooks and DOJ guidance on how to
15 respond to FOIA requests. *Id.* at ¶ 11. The Buchan Declaration continues that FSA understood,
16 through communication with Public Justice Foundation staff, that the April 17, 2019 FOIA
17 request sought “any internal guidance—formal or otherwise—including (*but not limited to*) any
18 *directives or policies instructing FSA officers to look out for certain requests from certain*
19 *groups and/or use select exemptions under certain circumstances.*” *Id.* at ¶ 12 (emphasis in
20 original). In its original search, “FSA identified one instance where guidance had been provided
21
22

23 ² Plaintiffs’ stipulated that FSA be allowed another 30 days until July 27, 2020 to serve its
24 *Vaughn* Index concerning its withholdings, Dkt. No. 24, Stipulation to Extend Time, at 2, which
25 this Court granted on June 25, 2020. Dkt. No. 25, Court Order Granting Stipulation. On July 27,
26 2020, FSA made a “discretionary release” of 8,966 pages of previously completely withheld
27 documents and filed its *Vaughn* Index which details sixty-nine redactions the agency made under
28 FOIA Exemption 6 to the 153 pages it has withheld in part. Dkt. No. 27, FSA’s Notice of Filing
Vaughn Index.

1 about a certain kind of request from a certain category of requesters The guidance consisted
2 of two e-mails totaling seven pages.” *Id.* at ¶ 13.

3 The Buchan Declaration explains that for its revised search “the agency out of an
4 abundance of caution took a broad view of the request to ensure that the search would capture
5 the agency’s actual directives and policies, *which are available on agency websites*, ... and also
6 e-mails that were most likely to be responsive because they specifically addressed the subject of
7 the agency’s directives and policies.” *Id.* at ¶ 16 (emphasis added). This new search “yielded
8 more than 30,000 pages of documents,” of which FSA withheld 8,966 in full, and 153 in part. *Id.*
9 at ¶¶ 20, 23 (chart). Ultimately, FSA produced 30,204 pages (including the 8,966 fully withheld
10 pages and the 153 partially withheld pages) to Plaintiffs on June 25, 2020. *Id.* at ¶ 36.

11 However, FSA admits the search was designed to produce a large volume of documents,
12 rather than the documents Plaintiffs requested. The Buchan Declaration states “FSA’s actual
13 policies and directive[s] do not amount to much more than several hundred pages, although those
14 same directives and policies have been repeatedly attached to emails that were captured in FSA’s
15 newly expanded search undertaken in the context of this litigation.” *Id.* at ¶ 35. Moreover, the
16 search terms used were either extremely broad (“FOIA Policy,” “FOIA Guidance,” “FOIA
17 Directives,” “FOIA processing,” “processing FOIA requests and appeals,” and “processing
18 FOIA appeals”) or were search terms specific to already publicly available information (“2-
19 Info,” and “App-70”). *Id.* ¶ 18. In other words, FSA crafted a search to find official (public)
20 policy statements, rather than the internal communications Plaintiffs requested, and highly
21 general information not tailored Plaintiffs nor FSA’s farm loan programs, and then ran that
22 search in such a way to reproduce those same documents over and over again, while avoiding
23 truly responsive material.

24 Plaintiffs reached out to FSA in order “to gain clarification on the existence and location
25 of documents produced in FSA’s June 25, 2020 production.” Exhibit A to Declaration of Kellan
26 Smith (“Smith Declaration”), at 2 (attached hereto). In response, FSA’s counsel confirmed that
27 the “several hundred pages” of policies and directives mentioned in the Buchan Declaration
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1 amounted to already publicly available records (including FSA’s FOIA notices, FSA’s current
2 FOIA handbook, and other publicly available policies) and a PowerPoint training presentation.
3 *Id.* at 3. FSA’s counsel did not confirm whether the revised search captured the seven pages of
4 emails captured in the agency’s original search, however, FSA’s counsel did confirm that those
5 documents were not re-produced in the June 25, 2020 production. *Id.* at 1, 3. Likewise, FSA’s
6 counsel could not confirm whether FSA’s new search captured the discussions within FSA that
7 concern requests for records that pertain to an Environmental Assessment identified in Plaintiffs’
8 complaint as highly responsive to Plaintiffs’ April 17, 2019 FOIA request. *Id.* at 2; *see also*
9 *supra*, at 6 (referring to discussions outlined in Plaintiffs’ Complaint, Dkt. No. 1, ¶¶ 93-105,
10 127). FSA’s counsel “encouraged” Plaintiffs’ undersigned counsel to “do a word search of the
11 OCR’d production.” *Id.* As detailed in the Smith Declaration attached hereto, Plaintiffs’
12 undersigned counsel performed a “word search” tailored to locate these documents in every
13 OCR’d file produced by FSA and was unable to locate them, indicating FSA’s search failed to
14 locate the relevant documents Plaintiffs *know* exist and identified for FSA ahead of their search,
15 Dkt. No. 1, ¶¶ 93-105, 127; Smith Declaration, at ¶¶ 7-8.

16 Pursuant to the Court’s Case Management Scheduling Order, Dkt. No. 23, Plaintiffs file
17 this motion detailing the deficiencies in FSA’s revised search and production of records
18 responsive to Plaintiffs’ April 17, 2019 FOIA request.

19 ARGUMENT

20 FSA’s revised search and production for documents responsive to Plaintiffs’ April 17,
21 2019 FOIA request is deficient. Moreover, because FSA’s search was designed to produce the
22 same publicly available documents when attached to the emails of various agency staff, the
23 production is a document dump of precisely the “overwhelming mass of irrelevant and
24 unresponsive material” FSA claims to have sought to avoid.

25 FOIA requires an agency to “make reasonable efforts to search for responsive records,” 5
26 U.S.C. § 522(a)(3)(C), using methods “reasonably calculated to uncover *all* relevant documents.”
27 *Zemansky v. EPA*, 767 F.2d 569, 571 (9th Cir. 1985) (emphasis added). “[I]f an agency has
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1 reason to know that certain places may contain responsive documents,” the agency must search
2 those places. *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 327 (D.C. Cir. 1999); *Our*
3 *Children’s Earth Found. v. Nat’l Marine Fisheries Serv.*, 85 F. Supp. 3d 1074, 1083 (N.D. Cal.
4 2015) (holding that an agency’s search was inadequate because it failed to search places it “had
5 reason to know ... contained responsive documents”). The agency bears the burden of
6 demonstrating in reasonable detail that the “search terms and type of search performed” was
7 likely to uncover *all* responsive records. *Oglesby v. Dep’t of Army*, 920 F.2d 57, 68 (D.C. Cir.
8 1990).

9 FSA has not met its burden to demonstrate that the search terms and type of search
10 performed was likely to uncover any, let alone all, truly responsive records. Despite FSA’s
11 understanding that Plaintiffs sought non-public information, i.e. “internal guidance—formal or
12 otherwise—including (but not limited to) any directives or policies instructing FSA officers to
13 look out for certain requests from certain groups and/or use select exemptions under certain
14 circumstances,” Buchan Declaration, at ¶ 12 (emphasis in original), the Buchan Declaration
15 states plainly that the agency’s revised search was made to capture directives and policies, which
16 are *already* “available on agency websites.” *Id.* at ¶ 16. In addition to this admission in the
17 Buchan Declaration, the search terms used were either extremely broad (“FOIA Policy,” “FOIA
18 Guidance,” “FOIA Directives,” “FOIA processing,” “processing FOIA requests and appeals,”
19 and “processing FOIA appeals”) or were search terms specific to already publicly available
20 information (“2-Info,” and “App-70”). *Id.* ¶ 18. Consequently, it appears, and FSA has not
21 demonstrated otherwise, *see* Exhibit A to Smith Declaration, that FSA’s revised production
22 merely contains already publicly available guidance, draft versions of said guidance they
23 released on a “discretionary” basis, emails attaching said guidance, and a PowerPoint training
24 presentation, rather than the internal communications Plaintiffs requested. The generality of
25 FSA’s search terms is blatantly at odds with Plaintiffs’ request as FSA understood it and alone
26 demonstrates the deficiencies in the agency’s search, as FSA was on notice that the information
27 Plaintiffs seek is internal guidance pertaining to how FSA responds to FOIA requests regarding
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1 FSA's farm loan programs and resulting environmental review, particularly if such guidance
2 concerns how to respond to requests originating from groups such as Plaintiffs. *See* Dkt. No. 1,
3 ¶¶ 4,106. Crucially, the revised search appears to have failed to uncover responsive documents
4 that were uncovered in the agency's original search, Buchan Declaration, at ¶ 13, and documents
5 Plaintiffs know exist and identified for FSA but were not produced as a result of the agency's
6 original search. Dkt. No. 1, ¶¶ 93-105, 127; *see* Smith Declaration ¶¶ 5-9 & Exhibit A.

7 Plaintiffs are not entitled to and do not seek perfection. Plaintiffs do not know if there is a
8 "smoking gun" in FSA's records that demonstrate they have a policy of redacting certain types
9 of records (such as records pertaining to FSA's farm loan programs) when certain groups (such
10 as Plaintiffs) seek them. However, Plaintiffs are entitled to a search that is likely to uncover this
11 responsive information to the extent it exists (and Plaintiffs have identified at least *some*
12 responsive information that exists that FSA failed to locate in either its original or revised
13 search). Moreover, Plaintiffs are entitled to a declaration from FSA that shows that the search
14 terms used and places searched are *likely* to uncover all responsive records. Thus, this Court
15 should direct FSA to re-perform its search to locate internal documents that provide guidance
16 and/or direction for how FSA employees should respond to FOIA requests that seek information
17 pertaining to FSA's farm loan programs, particularly if said responsive information references
18 Plaintiffs or other similar groups.

19 CONCLUSION

20 For the foregoing reasons, Plaintiffs respectfully request that the Court find Defendant
21 FSA's revised search and production for documents responsive to Plaintiffs' April 17, 2019
22 FOIA request deficient and order Defendant FSA to perform a new search and production
23 correcting the deficiencies outlined above and file and serve its new production and response,
24 alongside a declaration and *Vaughn* Index demonstrating the adequacy of the search and
25 justifying any withholdings, within fourteen days of this motion being heard.

26
27 Date: August 10, 2020

Respectfully submitted,

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